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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-313

FRANK MAZZEI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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FRANK MAZZEI,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 29, 1975.

CITATION TO OPINIONS BELOW

The Opinion of the District Court for the Western District of Pennsylvania is printed in Appendix B hereto and is reported at 390 F. Supp. 1098 (W. D. Pa. 1975). The Opinion of the Court of Appeals for the Third Circuit is not yet officially reported but is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix A hereto, was made and entered on July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED.

I. Whether the Hobbs Act (18 U. S. C. A. 1951(b)(2)) definition of extortion: "The obtaining of property from another with his consent, . . . under color of official right" was intended by Congress to be applied to the conduct of a person having no official position in or control over a State Executive Branch Department accepting money as payment for having exercised merely political influence over two decisions by such Executive Department granting State leases to the payor.

II. Whether the Hobbs Act may be constitutionally applied to purely intrastate activities, i.e., accepting money for the use of political influence to obtain two State leases of realty within the State on behalf of a Pennsylvania corporation solely on the theory that subsidiaries of that corporation doing business in interstate commerce were adversely affected by the resulting "depletion of assets" of the parent company.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional provision involved is Article I, Section 8, Clause 3, of the United States Constitution, which provides:

> "The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States . . ."

The Statute involved is the Hobbs Act, 18 U. S. C. § 1951 (1948). It provides:

> **"§ 1951. Interference with commerce by threats or violence.**
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent,

induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793."

STATEMENT OF THE CASE.

Petitioner was at all times relevant to this Indictment a Pennsylvania State Senator who now stands convicted in the United States District Court for the Western District of Pennsylvania on two counts of an Indictment charging that he extorted approximately $20,000 from B. M. I., Inc. in return for using his influence to obtain for B. M. I. two leases from the Department of Property and Supplies of the Commonwealth of Pennsylvania of space in a building owned by a B. M. I. through a subsidiary in Pittsburgh, Pennsylvania. The basis for Federal jurisdiction in the Court of first instance is 18 U. S. C. § 3231.

The evidence, viewed in the light most favorable to the prosecution, shows that B. M. I. purchased a building at 700 Bingham Street, Pittsburgh, Pennsylvania in March 1967. Most of this building remained vacant for several years thereafter and mortgage payments, insurance and municipal taxes, plus maintenance costs and depreciation, were a continued, substantial drain on the assets of the corporation. The corporation itself only occupied 4000 of 60,000 square feet of the building, which it used as the center of its accounting operation for 16 subsidiaries engaged in the business of selling refractory materials and products in interstate commerce.

The Corporate Secretary of B. M. I., Leo Kelly, made inquiry of a banker in the fall of 1971 about the possibility of obtaining City, County or State tenants for the unused portion of his building. The banker in turn introduced Mr. Kelly to Senator Mazzei who, at a later meeting, advised Mr. Kelly that it was the practice of all State leases that ten percent of the gross rental is paid to a Senate Re-election Committee for senators of both parties (R 106A). Senator Mazzei also advised Mr. Kelly of the maximum State rental figures. The premises were later inspected and accepted by officials of the Executive Branch of the State Government concerned and in due course Mr. Kelly executed

a lease to the State and thereafter paid petitioner a sum equal to ten percent of the gross rental.

The second transaction, covered by Count II of the Indictment, was handled identically and involved a lease to the Pennsylvania Department of Labor and Industry for a five-year period and the payment of 10% was again made to petitioner after execution of the lease by the Commonwealth and the lessor corporation.

The testimony of Mr. Kelly as a witness for the Government was that he made the payments because petitioner asked for them; that the building had been an economic loss and it was a good business decision from his point of view (145a-146a). Mr. Kelly candidly stated he did not regard his ten percent payments as a political contribution (177a) and no attempt was made to deduct them from Corporate taxable income (181a-182a).

Mr. Kelly was quite clear in his testimony that he never paid petitioner to perform any service in the Legislature (189a); that the money was not regarded as having been paid to petitioner to accomplish something he was elected to do (190a) and that he would not have paid petitioner for performance of any legislative duty (191a-192a). Mr. Kelly said that he was simply using petitioner's influence "to steer business his way" and he described the payments as being, in his mind, the equivalent of a real estate commission (197a).

The President of B. M. I., Inc., Lawrence Williams, said he believed the money was for a reelection fund (224a). He was aware that at the time of each of the payments the leases involved had already been signed, sealed and delivered (226a-227a). But in Mr. Williams' view, the payment ". . . seemed like the reasonable thing to do" (221a-222a).

Witnesses representing the Commonwealth of Pennsylvania stated the terms of the leases were fair and reasonable.

The District Court submitted the case to the jury on the issue of interstate commerce on the theory that commerce could have been found to be affected if the conduct of the defendant resulted in depletion of the assets of the corporation and thus to some degree adversely affected interstate commerce (373a(8)(9)) (N. T. 939-940). The Court of Appeals sustained the Government's position on this theory, holding that "this position accords with our previous holdings that where the resources of an interstate business are depleted or diminished 'in any manner' by extortionate payments, the consequent impairment of ability to conduct an interstate business is sufficient to bring the extortion within the play of the Hobbs Act. *United States v. Addonizio,* 451 F. 2d 49 (3rd Cir. 1971), cert. den., 405 U. S. 936 (1972); *U. S. v. Provenzano,* 334 F. 2d 678 (3rd Cir. 1964), cert. den., 379 U. S. 947 (1964)." The Court held that "Despite the local character of the lease transactions" the funds available to B. M. I. for use in the interstate activities of its subsidiaries were diminished "and its interstate business must to this extent be curtailed." (Ops. p. 5).

The Court of Appeals added:

> "We do not consider that the absence of effect on interstate commerce is shown by the fact that B. M. I. had a net cash inflow by reason of entering into the leases. Although B. M. I. undoubtedly used defendant's influence to put itself in a position where the award of State leases was likely, at that point it had the right to receive the full rental, described by State officials as completely reasonable, without paying the defendant some $20,000. to insure that the lease opportunities were not lost." Slip Opinion, page 6, n. 1.

As to the extortionate nature of the defendant's conduct, the Court of Appeals, conceding that "defendant had no statutory power as a state senator to control the granting of leases by state executive agencies," nevertheless

sustained the conviction on the ground that the jury could have concluded that "Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved." (Ops. p. 7)

Defendant was sentenced in the District Court to imprisonment for a period of five years, a fine of $10,000. and removal from office. The Court of Appeals modified that judgment by reversing the removal from office and otherwise affirmed. Hence, this Petition.

REASONS FOR GRANTING THE WRIT.

I. The Extortion Issue Is One of First Impression Nationally.

Judge Gibbons, joined by Judge Aldisert, dissenting in the Court of Appeals below states:

> "This case, which is one of first impression nationally at the Appellate level, requires us to explore the reach of The Hobbs Act's proscription of extortion." (18 U. S. C. 1951(a)).

The majority of the Court of Appeals has held that mere influence peddling by one who has no actual decisional power is extortion under color of official right within the meaning of The Hobbs Act. The majority reaches this conclusion by way of the argument that if petitioner created a reasonable belief in the mind of the payor that the power of his legislative office included the effective authority to determine recipients of state leases, petitioner would have acted "under color of official right." The majority appears to acknowledge that this departs from the common law definition of extortion which involves the unlawful acceptance of money under color of the office actually held by the extortionist. There is neither statutory nor decisional support for this position and the majority relies primarily on two of its prior decisions which involved widespread official conspiracies in the cities of Newark and Jersey City in which each defendant was convicted of conspiring with the relevant officeholder who actually possessed the decisional power for which payment was made. *United States v. Kenny,* 462 F. 2d 1205 (3rd Cir.) cert. den. 409 U. S. 914 (1972); *United States v. Addonizio,* 451 F. 2d 49 (3rd Cir.) cert. den. 405 U. S. 936 (1972).

In passing, the Court of Appeals overrules that part of its holding in *Addonizio* that "while the essence of bribery is voluntariness, the essence of extortion is

duress''. 451 F. 2d at 472. The Court of Appeals substitutes for this holding a statement that the element of coercion is supplied by the misuse of the defendant's official power. We would not quarrel with that statement if this were a case in which petitioner actually possessed relevant official power or were in conspiracy with the person who held the relevant office, but, as applied to a petitioner who neither has nor pretends to have decisional power, the holding is a marked departure from all prior common law and federal decisions on the issue.

The dissent forcefully argues that Congress, by the use of the term ''under color of official right'', intended to adopt the common law definition of extortion. The majority opinion elides the relevant legislative history which, of course, argues to the contrary of the majority's implied position that the federal courts are free to fashion their own definition of extortion under the Hobbs Act, despite the common law.

The Court of Appeals ignores as well this Court's decision in *United States v. Nardello,* 393 U. S. 286 (1969) holding the common law definition of extortion applicable under the Travel Act (18 U. S. C. 1952).

The decision of the Third Circuit is likewise at odds with the interpretation placed on this section by the Court of Appeals for the Seventh Circuit in *United States v. Staszcuk,* 502 F. 2d 875 (7th Cir. 1974) (reaffirmed on rehearing May 16, 1975) and *United States v. Braasch,* 505 F. 2d 139 (7th Cir. 1974), where that Court looked to the actual rather than apparent official power of the defendants involved.

II. The Court of Appeals Has Ignored This Court's Decisions Urging Narrow Construction of Federal Criminal Jurisdiction.

In *United States v. Enmons,* 410 U. S. 396 (1973) this Court affirmed the dismissal of a Hobbs Act Indictment charging union members with conspiracy to extort an agreement by violence. Rejecting the broad construction argued by the Government this Court held:

> ''It is unlikely that if Congress has indeed wrought such a major expansion of Federal criminal jurisdiction in enacting The Hobbs Act, its action would have so long passed unobserved. . . . Even if the language and history of the Act were less clear, than we have found them to be, the Act could not be properly expanded as the Government suggests—for two related reasons. First, this being a criminal statute, it must be strictly construed, . . . Secondly, . . . Neither the language of The Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in the Federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.'' 410 U. S. at 410.

In *Enmons* this Court reiterated the cautionary guidelines of its opinions in *United States v. Bass,* 404 U. S. 336 (1973), and *Rewis v. United States,* 401 U. S. 808 (1971):

> ''Congress has traditionally been reluctant to find as a Federal crime conduct readily denounced as criminal by the States. This Congressional policy is rooted in the same concepts of American Federalism that provided the basis for judge-made doctrines. See: *Younger v. Harris,* 401 U. S. 37 (1971).'' 404 U. S. at 339.

This Court has seen fit to repeat similar cautionary language in *Erlenbaugh v. United States,* 409 U. S. 239 (1972).

III. The Depletion of Assets Theory of Interstate Commerce Violates the Commerce Clause and Appears at Variance With Prior Decisions of This Court.

Section 1951(b)(3) defines the relevant commerce as "all commerce over which the United States has jurisdiction". We do not quarrel with the Congressional intent to exercise the full extent of the commerce power but the Court of Appeals has exceeded that limit.

As petitioner views the law, there is a two-fold test for Hobbs Act application to commerce and it is, first, that the transaction must pass the Constitutional test of interstate commerce, and secondly, the statutory test. In other words, before a Court may enter upon consideration of whether a given extortion "in any manner or degree obstructs, delays or affects commerce," §1951(a) it must first determine that the transaction meets the Constitutional test of interstate commerce. Congress, in using the phrase "all commerce over which the United States has jurisdiction," was plainly not attempting to describe a penumbral area which it found to be affected interstate commerce (as in *Heart of Atlanta Motel v. United States,* 379 U. S. 241 (1964) mistakenly relied on by the Court of Appeals below); rather, Congress obviously intended to confide to the courts alone the determination of the reach of the commerce power for the purpose of the Hobbs Act unaided and unhampered by any Congressional finding or declaration of scope or purpose.

This Court has unequivocally held in *10 East 40th Street Building v. Callus,* 325 U. S. 578 (1945):

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

This Court has also unequivocally held that to translate essentially local activity into Federally regulable commerce there must be shown "such a close and a substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions . . ." *N. L. R. B. v. Jones and Laughlin Steel Corporation,* 301 U. S. 1 (1937). This test has been consistently applied from *Gibbons v. Ogden,* 9 Wheat. 1, 195, 6 L. Ed. 23, 70 (1824) through *Heart of Atlanta Motel, supra; Katzenbach v. McClung,* 379 U. S. 294 (1964) and *Allenberg Cotton Co., Inc. v. Pittman,* — U. S. —, 42 L. Ed. 2d 195 (1974).

The Third Circuit holds in this case that the payment of $20,000. to petitioner depleted the assets of the local Pennsylvania parent company and thus impaired the interstate business of its 16 subsidiaries. The Court ignores the net economic benefit of $180,000. to the corporation and its subsidiaries and appears to apply a moral rather than economic test to the transaction, thus unconstitutionally importing a police power standard into the interpretation of the Commerce Clause. The Court of Appeals does not reckon with the obviously local characteristics of the transaction which would exclude Federal jurisdiction if the ten percent involved were a lawful finder's fee, a State tax, a municipal Use and Occupancy tax or a real estate commission such as the payor described it to be in this record.

The Court of Appeals also ignores the unparalleled potential expansion of Federal jurisdiction which the depletion theory allows simply by virtue of the fact that in 1975 hardly a person or corporation in the United States does not buy and sell in interstate commerce and the most local crime of robbery, blackmail or official extortion is thus made a Federal offense.

The Court below thus ignores the sensible caution of Chief Judge Swygert's dissenting Opinion in *United States v. Amabile,* 395 F. 2d 47, 54 (7th Cir. 1968) reiterated in the following language from the same judge's concurring

Opinion in *United States v. De Met*, 486 F. 2d 816, 823 (7th Cir. 1973):

> "If a depletion of reserves is all that is necessary to show the requisite effect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the Statute's proscription. Under this rationale, a retail store owner, for example, would be afforded Federal protection from extortion, regardless of the nature or the likely effect of the threat simply because his stock of merchandise has in some measure moved in interstate commerce."

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that this Court should issue its Writ of Certiorari to the Court of Appeals for the Third Circuit to review its instant decision.

Respectfully submitted,

JOHN ROGERS CARROLL,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1357

UNITED STATES OF AMERICA,
Appellee,

v.

FRANK MAZZEI,
Appellant.

(Crim. No. 74-319—W.D. of Pa.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued Before the Court In Banc
May 8, 1975
Before SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

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OPINION OF THE COURT

(Filed July 29, 1975)

SEITZ, *Chief Judge.*

Defendant Frank Mazzei appeals from his conviction after a jury trial of two counts alleging extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1970). His challenge raises questions regarding the jurisdictional reach of the Hobbs Act and the substantive content of the crime of extortion which it defines.

The parties are in basic agreement on the facts. B.M.I., Inc., a Pennsylvania corporation and the victim of the alleged extortion, is the holding company of sixteen subsidiaries which engage in interstate businesses largely relating to the manufacture and installation of bulk refractory materials used in blast furnaces. B.M.I. is headquartered in a building at 700 Bingham Street, Pittsburgh, Pennsylvania, title to which is in the name of a wholly-owned subsidiary, Pneumatic Concrete Corporation. Accounting services for B.M.I. and all its subsidiaries are centered in the building and services such as billing and payments of accounts receivable are carried out by B.M.I. for all its subsidiaries from the office.

Prior to 1971, only one-half of the second floor of the Bingham Street building was occupied. Apart from B.M.I.'s offices on this floor, the remainder of the second floor and the whole first and third floors were vacant. Leo Kelly ("Kelly"), secretary-treasurer of B.M.I. and all its subsidiaries, was anxious to lease the unused space to reduce overhead costs. Kelly spoke with Gerald R. Creehan, a director of a local bank, about the possibility of securing tenants. Mr. Creehan had learned that the defendant, a Pennsylvania state senator, was seeking office space on the Southside of Pittsburgh. Defendant was reportedly seeking a location in his district for the Pittsburgh regional office of the new Bureau of State Lotteries, even

though as a legislator he had no statutory power with respect to the Bureau's leasing practices. Kelly asked Mr. Creehan to set up a meeting with the defendant.

A meeting was held in November 1971 between defendant and Kelly at which leases were mentioned but not discussed in detail. The defendant later visited the premises, and at Kelly's invitation, a dinner meeting was held on January 8, 1972, where leases were again discussed generally. At approximately the same time, the premises were inspected by a representative of the Department of Property and Supplies, the state authority responsible for securing office space for state agencies, to determine their suitability for occupancy as a lottery office.

Without prior notice, defendant visited Kelly at the B.M.I. office on January 11, 1972, to suggest the rental which B.M.I. should submit in its proposal to the state. Kelly testified that at this meeting defendant informed him that "it was the practice on all state leases that a ten per cent of the gross amount of the rentals would be paid to a senate finance re-election committee. . . ." The payment was to be in cash at the beginning of the lease. Defendant then proceeded to compute the gross rental and the ten per cent payment on a pad in Kelly's office. The page on which defendant had made his calculations was received into evidence at trial.

On January 13, 1972, Kelly submitted a proposal to the Department of Property and Supplies for lease of a portion of the first floor of the Bingham Street building to the Bureau of Lotteries. The executed lease was received from the state on March 23 or 24, 1972, and shortly thereafter defendant inquired of Mr. Creehan whether Kelly had left an envelope for defendant at Creehan's bank. At defendant's request, Mr. Creehan relayed the message to Kelly, who authorized the withdrawal and delivery to defendant of $8,755, which Kelly computed to be ten per cent of the gross rental B.M.I. would receive under the lease. The money was delivered personally to defendant in late March 1972.

In November or December 1972, defendant stopped in at the B.M.I. offices to ask Kelly if he was interested in leasing space to the Department of Labor and Industry, again an executive agency with which defendant had no statutory connection. On December 27, 1972, defendant brought officials from the Departments of Property and Supplies and Labor and Industry to view the premises. Other state officials visited during the spring of 1973. Sometime shortly before April 14, 1973, Kelly and defendant discussed B.M.I.'s proposal for the Labor and Industry lease. Defendant again suggested the rental B.M.I. should propose and informed Kelly that the same ten per cent arrangement would be in effect. B.M.I. submitted a proposal, later revised at defendant's behest, that led to receipt of an executed lease from the state on July 20, 1973. After defendant indicated that he had to have his cash payment that same day, Kelly delivered $11,300 (10% of the gross rental) to defendant's secretary at his nearby office. Defendant acknowledged receipt of the money by telephone.

On appeal, defendant challenges his conviction on two grounds: (1) the transactions from which the charges arose lacked sufficient impact on interstate commerce to give rise to federal jurisdiction over them and (2) his receipt of money did not amount to extortion within the meaning of the Hobbs Act. Defendant also challenges a portion of his sentence which ordered his removal from state office as beyond the power of the district court.

Effect on Interstate Commerce

Defendant acknowledges that in enacting the Hobbs Act, Congress intended to "use all the constitutional power [it] has to punish interference with interstate commerce. . . ." *Stirone v. United States,* 361 U.S. 212, 215 (1960). He contends, however, that the transactions involved here did not touch upon interstate commerce and that, therefore, the Hobbs Act cannot constitutionally be construed to embrace his conduct.

Defendant has admitted that although B.M.I. does no interstate business itself, it is "legitimate" to identify B.M.I. with its wholly controlled subsidiaries that are engaged in substantial interstate operations. Conceding the interstate character of the B.M.I. enterprise, defendant still contends that federal jurisdiction is lacking because the lease transactions in which B.M.I. were engaged here are "local" in nature. He urges that only if we can find that the lease transactions themselves affected interstate commerce may we assess the impact of the alleged extortion on interstate commerce.

The government, on the other hand, urges us to find both federal jurisdiction and Hobbs Act coverage on the theory that the some $20,000 in payments to defendant depleted the assets of B.M.I. and thereby affected its power to operate in interstate commerce. This position accords with our previous holdings that where the resources of an interstate business are depleted or diminished "in any manner" by extortionate payments, the consequent impairment of ability to conduct an interstate business is sufficient to bring the extortion within the play of the Hobbs Act. *United States v. Addonizio,* 451 F.2d 49 (3rd Cir. 1971), *cert. denied,* 405 U.S. 936 (1972); *United States v. Provenzano,* 334 F.2d 678 (3rd Cir.), *cert. denied,* 379 U.S. 947 (1964). Defendant would distinguish these cases on the ground that in each there was a direct and immediate effect on interstate commerce that is wholly lacking here.

Despite the local character of the lease transactions giving rise to the alleged extortion in this case, we are of the opinion that the depletion of B.M.I.'s assets provides a jurisdictional basis under the Hobbs Act for the maintenance of this action. B.M.I. owns subsidiaries which purchase materials in a number of states for use in manufacturing products sold in almost every state. As a result of defendant's actions, funds available to B.M.I. for use in such interstate activities have been diminished and its interstate business must to this extent be curtailed. Because of this effect on interstate commerce, the fact that the alleged

extortion arose from a local lease to a state agency is not dispositive, for "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460, 464 (1949). Although enunciated in an antitrust context, the principle stated in the quoted language has broad application to questions regarding congressional power under the commerce clause. *See, e.g., Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

We therefore conclude that the Hobbs Act may constitutionally be construed to reach the indirect burdens placed on interstate commerce by the extortionate activities alleged in this case and that such a construction of the statute accords with Congressional intent to proscribe extortion which "in any way or degree obstructs, delays, or affects commerce." 18 U.S.C. § 1951(a).[1] *United States v. De Met,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); *United States v. Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972); *cf. United States v. Staszcuk,* No. 73-1869 (7th Cir., filed May 16, 1975); (in banc) *cert. pet. filed* 43 U.S.L.W. 3675 (June 13, 1975) (jurisdiction under the Hobbs Act may be satisfied by showing a "realistic possibility that an extortionate transaction will have some effect on interstate commerce.")

Extortionate Nature of Defendant's Conduct

Defendant also contends that his conduct, whatever other laws it might violate, does not constitute extortion within the meaning of the Hobbs Act. The statute defines extortion as

1. We do not consider that an absence of effect on interstate commerce is shown by the fact that B.M.I. had a net cash inflow by reason of entering into the leases. Although B.M.I. undoubtedly used defendant's influence to put itself in a position where the award of state leases was likely, at that point it had the right to receive the full rental, described by state officials as completely reasonable, without paying defendant some $20,000 to insure that the lease opportunities were not lost.

> The obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Defendant characterizes the payments made to him as B.M.I.'s voluntary purchase of his influence in an area in which he had no official power and in which he never pretended to have any official power. He further contends that there was no element of coercion present, and that therefore he could not be guilty of extortion even if he had been acting "under color of official right."

It is clear, of course, that defendant had no statutory power as a state senator to control the granting of leases by state executive agencies. But in order to find that defendant acted "under color of official right," the jury need not have concluded that he had actual *de jure* power to secure grant of the lease so long as it found that Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved. *See United States v. Price,* 507 F.2d 1349 (4th Cir. 1974) (per curiam); *United States v. Staszcuk, supra* (adopting by reference the panel opinion at 502 F.2d 875 (7th Cir. 1974) on this point). Such an exploitation involves the wrongful use of official power that has long been punished at common law as extortion "under color of public office." *See, e.g., Commonwealth v. Wilson,* 30 Pa. Super. 26 (1906). The issue of Kelly's belief and its reasonableness was a jury question which was submitted under appropriate instructions.[2]

Kelly's belief in defendant's power over state leases in his district is amply established by the record. In his most succinct statement in this respect, Kelly testified:

2. A portion of the court's instruction was that the defendant could be convicted if the jury found "that Leo Kelly reasonably believed that the senator's official functions included the securing of leases with the Commonwealth of Pennsylvania" and "that Senator Mazzei used his office or wrongfully used his official power."

> I thought that was the method that state leases were handled. I just accepted it as gospel.
>
> . . . .
>
> I don't know how it works in Harrisburg. . . . [T]here has to be that influence and power, and they were letting the senator do it.

Furthermore, we find after a careful review of the record in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), that the evidence permitted the jury to find that Kelly's belief in defendant's power was reasonable. With respect to the first lease, we note that there were rumors that defendant was looking for space for the lottery office. Kelly's meetings with defendant in December 1971 and January 1972 produced an inspection by an official of the Department of Property and Supplies even though no one from B.M.I. had contacted anyone other than defendant. Also, defendant suggested that B.M.I. propose to the state a rental of $4.25 per square foot, which he said was the rate at which a recent state lease in Philadelphia had been awarded and the highest that the state would approve. These representations by the defendant himself suggest an intimate awareness of state leasing practices.

When defendant opened negotiations with respect to the second lease and brought officials to inspect the premises, other officials from the Department of Labor and Industry appeared without any request from B.M.I. personnel. As with the lottery lease, defendant suggested a proposed rental for submission to the state, this time at $4.90 per foot because parking spaces would be provided. When B.M.I. did not follow his recommendation and submitted to the state a proposal of $4.35 per foot that excluded janitorial services, defendant quickly called Kelly to advise him that the proposal should be at the higher rate he suggested and must cover janitorial services. Kelly told defendant to "put it in at $4.90," and without the submission

of a revised proposal by B.M.I., the state returned a lease with a rate of $4.90 which required B.M.I. to provide the additional services. Furthermore, on two occasions in July 1973, defendant assured Kelly that B.M.I. would secure the Labor and Industry lease. One such assurance was given in a meeting on July 18, 1973, where defendant calculated the five year gross rental figure, on which the ten per cent payment would be based, on a paper introduced into evidence at trial. In these computations, defendant used a yearly rental of $22,569.40, the rental computed at the $4.90 rate and the exact rental stated in the lease received by B.M.I. from the state two days later.

Thus, defendant had the ability to initiate state inspection of the premises, to specify rental rates that would be and were acceptable to the state, and to alter B.M.I.'s proposal on the second lease. Also, throughout the lease negotiations, defendant displayed to Kelly intimate knowledge of the decision making process involved in the granting of state leases. This, in our view, constituted sufficient evidence to justify a finding by the jury that Kelly could reasonably have believed that as a concomitant of his official position defendant possessed not mere influence over state leases but in fact had effective power to determine to whom these leases were awarded even though his office gave him no such *de jure* power.

Defendant urges, however, that even if he did have some power to influence the awarding of state leases, he still did not commit extortion in his receipt of payments of some $20,000 from B.M.I. He acknowledges that in *United States v. Kenny,* 462 F.2d 1205 (3rd Cir.), *cert. denied,* 409 U.S. 914 (1972), we held that the Hobbs Act is to be read disjunctively and approved an instruction that extortion could be established either when property is obtained through the use of fear or by one acting under color of official right. 462 F.2d at 1229. He contends, however, that a coercive use of office must be established even when the prosecution is based on the alternate ground of "color of

official right," and relies on the statement of this court in *Addonizio* that "while the essence of bribery is voluntariness, the essence of extortion is duress." 451 F.2d at 72. We do not agree with this contention because we are satisfied that in such a prosecution, any element of coercion that may be required to establish extortion under the Hobbs Act is supplied by the misuse of the defendant's official power.

The definition of extortion in the Hobbs Act is substantially that of its predecessor statute, the Anti-Racketeering Act of 1934, ch. 569, §§1-6, 48 Stat. 979. Unfortunately, however, the legislative history of neither statute provides any hint of congressional intent in adopting this definition of extortion, other than statements by proponents of the Hobbs Act that the statute did no more than incorporate the conventional definition of extortion contained in New York law. *See, e.g.,* 91 Cong. Rec. 11842 (1945) (remarks of Rep. Walter); *id.* at 11843 (remarks of Rep. Michener).

We must, therefore, look to the face of the statute to determine its meaning. As we noted in *Kenny,* the "under color of official right" language

> repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. 462 F.2d at 1229, citing *United States v. Nardello,* 393 U.S. 286, 289 (1969).

Under the common law definition, color of public office took the place of the coercion implied in the ordinary meaning of the word extortion. *United States v. Sutter,* 160 F.2d 754 (7th Cir. 1947). Further support for the proposition that overt coercion need not be proved in a Hobbs Act prosecution for receipt of property "under color of official right" is supplied by the disjunctive wording of the statute which strongly implies that a showing of "force, violence or fear" is not required when the prosecution is based on the theory that money was obtained through wrongful exercise of the power of office.

We conclude that *Kenny* properly read the statute and that a showing of the inducement of payments "under color of official right" may replace proof of the coercion of "force, violence or fear" in a Hobbs Act prosecution. A violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of "force, violence or fear." *United States v. Staszcuk, supra* (adopting by reference the panel opinion at 502 F.2d 875 (7th Cir. 1974) on this point); *United States v. Price, supra.* We do not construe *Addonizio* to hold to the contrary, since that case was submitted to the jury only on the theory that money had been obtained through the use of fear, and the question presented here and in *Kenny* was not before the court there.

We are convinced, therefore, that the evidence in this case justified a finding by the jury that the payments to defendant were induced by an exploitation of Kelly's reasonable belief that defendant's position as a state senator provided him with effective control over the state leases here involved even though he lacked *de jure* authority to act in this sphere. In consequence, we conclude that consent to the payments was "induced . . . under color of official right" and in violation of the Hobbs Act even without proof of the exercise of overt coercion.

Removal From Office

In its sentence of April 11, 1975, the district court ordered defendant removed from office as a Pennsylvania state senator. On June 2, 1975, the Pennsylvania Senate purported to expel defendant from office. Although we take notice of the Senate's action, we reject the government's urgings that because of the intervening expulsion we should decline to treat the question of the propriety of the order of removal on the ground of mootness. In the first place, we cannot assume that defendant concurs in

the propriety of his expulsion by the Senate, and this matter has not yet been adjudicated. Thus, the controversy regarding his right to remain in the state Senate is still a live issue. In addition, failure to address the issue of removal would leave unresolved a challenged assertion of the power of a federal court to remove a state official from office. The significance of the assertion of federal power by the district court in this particular context demands that we determine defendant's challenge.

The district court purported to act pursuant to a Pennsylvania statute, 65 P.S. § 121 (Supp. 1974), which provides that upon conviction in a court of record of extortion or other specified crimes, any person holding public office "shall forfeit his office, and the sentence imposed by the court shall include the direction for the removal from office of such person." The government contends that although the district court had no power to impose any penalty beyond that specified by Congress for violation of the Hobbs Act, it did have the power to enforce what the government construes as an automatic forfeiture of office by operation of the Pennsylvania statute. It offers alternate theories to sustain the district court's order: (1) removal could be imposed as a condition of release pending appeal; (2) the court has the inherent power to enforce the policy expressed in the statute; or (3) the court could take notice of and enforce a collateral consequence of defendant's conviction.

We perceive no basis upon which the district court's order of removal was justified. Removal from office was in no sense imposed as a condition of release pending appeal, and indeed, could not have been, since release after conviction is determined on the basis of considerations of likelihood of flight and danger to the community, 18 U.S.C. § 3148 (1970), and not on whether defendant might infringe the public policy of Pennsylvania by remaining in office. Nor can we find any authority for inherent power in the district court to enforce the policy of the Pennsylvania statute. As a court of limited jurisdiction, the district

court possessed only the power to act in this criminal case which Congress has given it by statute. As the Supreme Court has stated:

> The law of our country takes care . . . that not the weight of a judge's finger should fall upon anyone except as specifically authorized. *In re Bonner,* 151 U.S. 242, 259 (1884).

We can see no escape from this principle by arguments that the district court's order was not penal in nature, but merely the enforcement of a "judicially noticeable collateral consequence of defendant's conviction." The simple and unassailable fact is that Congress has given the district court no power to take any action in sentencing a defendant except to impose a punishment within the limits prescribed by statute. The order of removal was beyond the power of the court.

The order directing defendant's removal from office is separate and distinct from the remainder of the district court's sentence. We are in a position, therefore, to adjudicate its invalidity without disturbing the clearly authorized sentence of fines and imprisonment. For this reason, we will exercise our power to correct the sentence rather than remanding the case for the execution of this ministerial act.

The judgment of the district court will be modified by deleting that portion directing that defendant be removed from the office of Pennsylvania State Senator. As thus modified, the judgment will be affirmed.

GIBBONS, *Circuit Judge,* dissenting, with Judge Aldisert joining

This case, which is one of first impression nationally at the appellate level, requires us to explore the reach of the Hobbs Act's proscription of extortion. 18 U.S.C.

§ 1951(a). More particularly, it deals with that branch of § 1951(b)(2) which defines "extortion" as "the obtaining of property from another, with his consent . . . under color of official right." Does the Act prohibit a person having no *official* position in, or control over, a state executive branch department from taking money in exchange for the exercise of political influence over two decisions by that department? Of course, the majority does not make so bald a statement of the issue. Rather they choose nominally to rely upon the fact that the appellant, Mazzei, held the office of senator in the state government's legislative branch. They choose to ignore the fact that *it was Mazzei's influence, not his office,* which accomplished the results for which the payments were made. On this record, I can conclude only that Mazzei's willing victim perceived him to be exactly what he was—a power-broker. In Kelly's eyes, at least, Mazzei's position was no different from that of an influential state or county political leader holding no office whatsoever. If Mazzei violated the Hobbs Act by representing that he had the *de facto* power to influence the state executive department's decisional processes, then anyone, whether in or out of office, can also be convicted. This may be a desirable result—in the abstract. It is not, I submit, what Congress intended when it enacted the Hobbs Act.

I Areas of Agreement and Disagreement

Assuming Congress had made the conduct a crime, I agree that the transaction alleged in the indictment had a sufficient impact upon interstate commerce to sustain constitutionally the exercise of federal criminal jurisdiction.[1] I agree, as well, that § 1951(b)(2)'s definition of extortion should be read disjunctively to cover either coercive extortion or receipt of money under color of official right.[2]

1. United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972); United States v. Provenzano, 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964).

2. United States v. Kenny, 462 F.2d 1205, 1228-29 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972).

Moreover, I agree that examined in the light most favorable to the government,[3] the evidence permitted the jury to conclude that Kelly, the all-too-willing victim, had a reasonable belief that Mazzei had the *de facto* power to influence the state's leasing decisions. But I do not find any evidence in the record suggesting that Kelly had any ground for believing that the 10% commission on gross rentals was an official emolument of the office of state senator, nor does the majority suggest that any such evidence exists. The majority's holding is found in this one sentence:

> "But in order to find that defendant acted 'under color of official right,' the jury need not have concluded that he had actual *de jure* power to secure grant of the lease so long as it found that Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved." (Majority op. at 7).

A review of the transcript reveals that the district court did *not* charge that the jury had to find that Kelly had a reasonable belief "that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases."[4]

3. Glasser v. United States, 315 U.S. 60, 80 (1942).

4. The court charged:

> "Extortion under color of official right is the wrongful taking by a public official, such as a state senator, of money not due to the official or due to his office.
>
> Extortion, as defined by federal law, is committed when money is wrongfully obtained by consent of the victim under color of official right. When so obtained, the crime has been committed.
>
> The use of public office to obtain payments of money is the crux of the statutory requirement under color of official right. Wrongful use of official power can be a basis for extortion. It matters not whether the public official induces payments of money to perform his duties or not to perform his duties. It matters not whether the public official performs acts or does not

Thus the majority is affirming on a different theory from the one actually presented to the jury.

Explicating that portion of the charge reprinted in the margin,[5] we see that the district court defined the term "under color of official right" first negatively and then affirmatively. In the negative portion the court made clear that the jury did not have to find that the payments had anything to do with the performance or non-performance of senatorial duties, or with the performance or non-performance of "acts unrelated to [such] duties which can only be undertaken because of his official position." Thus, by negative definition the charge excluded the necessity for a finding that a state system placed even the *de facto* decisional responsibilities in the state senator as such. Nor did the district court charge that Kelly had to have had a reasonable belief in the existence of such a system. The key sentences in its affirmative definition of "under color of official right" are these:

> "So long as the motivation of payment of money by the victim focuses on the public official's office, the conduct violates the Hobbs Act. Thus, if you find that Senator Mazzei held himself out to BMI, Incorporated *as being in a position to influence the granting of the leases in question,* you need not find that he was actually legally empowered to do so, to find he was acting under color of official right." (Tr. at 943) (emphasis added).

If we look at the charge on official right in its entirety the most that can be said to have been submitted to the jury

4. (Cont'd.)
perform acts unrelated to his duties which can only be undertaken because of his official position.

So long as the motivation of payment of money by the victim focuses on the public official's office, the conduct violates the Hobbs Act. Thus, if you find that Senator Mazzei held himself out to BMI, Incorporated as being in a position to influence the granting of the leases in question, you need not find that he was actually legally empowered to do so, to find he was asking under color of official right." (Tr. at 942-43).

5. *See* note 4 *supra.*

was that it must find (a) that Mazzei was a Senator, and (b) that he represented that *he, not his office,* had the power to influence the granting of the leases. Moreover, the charge is sufficiently ambiguous so that the jury may well have understood the reference to the public official's office as a reference not to the office of state senator but to an "office" exerting *de facto* power in the Bureau of Lotteries or the Department of Labor and Industry. But, let me resolve this ambiguity in favor of the government. Then, I must conclude that the case was submitted to the jury on the theory that the Hobbs Act is violated when an influence peddler, who is also a state senator, says that for a fee he can influence the decisions of a different governmental branch and does so.

The district court understood perfectly well that it was giving the case to the jury on an influence peddling charge having nothing to do with the *de jure* or *de facto* powers of the office of state senator. It expressly declined to charge these defendant's requests:

> "5. Extortion under color of official right occurs when a public officer, including elected officers, obtains anything of value under the pretense that the officer was entitled to it by virtue of his office. If a person who happens to be a public officer renders a service in his private capacity and demands a payment therefor or makes any demand in his private capacity, it is not extortion because it was not done under color of official right. . . .
>
> 6. (Alternate request: Extortion) Before you can convict defendant of inducing payments under color of official right, you must be satisfied beyond a reasonable doubt that the following occurred:
>
> . . . .
>
> (c) that Senator Mazzei performed acts which could only be undertaken because of his official position;

(d) that the motivation for payment focused on defendant's position as a senator as distinguished from his ability to exert political influence." (II App. at 356a-57a).

Contrasting the charge as given with the requests to charge that were explicitly rejected, it simply cannot be said that the case went to the jury on the theory that it could convict if it found that there was or was represented to be a state system vesting power over leases in the state senator. Nor did the district court understand that the jury had to find that the victim entertained any belief, reasonable or otherwise, on the subject of official right, for the court totally rejected defendant's request to charge number 7 reprinted in the margin.[6]

My areas of disagreement with the majority, then, are threefold. First, I do not agree that the case was submitted to the jury on the theory that Mazzei represented that state senators had by virtue of a state system the *de*

6. "7. COLOR OF OFFICIAL RIGHT: In determining whether the money was obtained under color of official right you must consider all of the facts upon which Mr. Kelly acted. Did he seek out Senator Mazzei or did the senator seek him out? Did he believe from the outset that the agreement between him and the senator involved an official task of the senator or an unofficial, political favor? *Did he believe that he was paying the money for something the senator was supposed to do as a senator? Did he know that the ultimate decision was in the hands of the Lottery Bureau, the Department of Properties and Supplies?* Did the documents, including the original proposal and the leases themselves, place him on notice that Senator Mazzei could not exert any official influence in securing the leases? Did he know or should he have known that, once the leases were obtained, payment to the senator was not payment for any official conduct and therefore not under color of official right? Did the manner by which the corporation treat the payments on their books and records reveal that it was making a political contribution and therefore not paying under color of official right? Ultimately, you should ask yourselves whether Mr. Kelly agreed to pay for the senator's efforts in getting all of the parties together so that BMI could get preferential consideration for leases which Mr. Kelly knew had to be approved by others than Senator Mazzei." (II App. at 357a) (emphasis added).

facto emolument of office of control over leasing decisions.[7] Second, I do not agree that the charge as given defines a crime under the Hobbs Act. Third, I do not believe that the Hobbs Act reaches the offense which the majority has constructed, rather than that actually defined in the court's charge.

II The Authorities

No authority in this circuit has held that "under color of official right" portion of § 1951(b)(2) covers influence peddling. In the three cases in which we h ve applied the Hobbs Act to state public officials, the money extorted was taken by or on behalf of the persons holding municipal offices vested with decisional responsibility for the desired end. *United States v. Somers,* 496 F.2d 723 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974); *United States v. Kenney,* 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972); *United States v. Addonizio,* 451 F.2d 49 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972). To the extent that defendants not holding the offices responsible for the desired end were involved in those cases, they were properly included by virtue of 18 U.S.C. § 2(a). But Mazzei is not charged with having participated in obtaining money on behalf of or in aid of someone holding an office in the executive branch of Pennsylvania government. Rather, he is charged with obtaining money for himself by virtue of his influence there. Since there are no Third Circuit cases applying the color of official right provision to an influence peddler the majority looks outside this circuit to *United States v. Staszcuk,* No. 73-1869 (7th Cir. May 16, 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (U.S. June 24, 1975) where the en banc court adopted, by reference, the panel opinion at 502 F.2d 875 (7th Cir. 1974), and to *United States v. Price,* 507 F.2d 1349 (4th Cir. 1974) (per curiam). These are slim reeds upon which to base a major enlargement of federal criminal law enforcement jurisdiction. The per curiam dictum in

7. I concede that viewed in the light most favorable to the government the evidence would have supported such a finding, had such a charge been given.

Price is particularly insignificant since the court actually holds that the conviction was sustainable under the other branch of §1951(b)(2) dealing with coercion. But even on the color of official right aspect, the case involved a city councilman who led his victim to believe that *as such* he had *de facto* power to prevent the issuance of an occupancy permit. The jury was instructed that

> "[t]he issue . . . is not whether the defendant had the power to withhold the permit, but whether it was reasonable for [Scotsman to believe] that he . . . had such power." *Id.* at 1350.

The appeal raised only the issue whether the jury must have found *de jure* statutory power in the councilman. The case simply did not involve influence peddling. *Staszcuk* involved a payment to an alderman, who *as such* had standing before the appropriate zoning authority to oppose a zoning application in his ward, for refraining from opposing the application. The payment was for the purpose of influencing the defendant's conduct as alderman, not for purchasing his influence with others. An alderman clearly is a public official, and Staszcuk took money under color of that office to influence his conduct in that office. Neither *Price* nor *Staszcuk* deal with payments for influence over third-party conduct. No case to which we have been referred has ever applied the Hobbs Act in the circumstances presented by this record.

III Mazzei's Conduct Did Not Constitute Common Law Extortion

At common law extortion was an offense that could only be committed by a public officer. In Blackstone's words, "*extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due."[8] Since the

8. 4 W. Blackstone, Commentaries *141.

essence of the offense was the abuse of the public trust that inhered in the office there never was any doubt that the powers of the office under color of which the defendant acted, or pretended to act, must, if actually held, have made possible the effectuation of the extortionate act. *See, e.g.*, II J. Bishop, *Commentaries on the Criminal Law* §329, at 246 (2d ed. 1859); R. Desty, *A Compendium of American Criminal Law* §84a, at 214-16 (1887); J. May, *Law of Crimes* §81, at 104-05 (4th ed. K. Sears & H. Weihofen 1938); 3 F. Wharton, *Criminal Law & Procedure* §1393, at 790-91 (R. Anderson ed. 1957). A leading case describes the crime thus:

> "The offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office. It is thus apparent that the crime of extortion is committable only by an officer. The officer need not possess a legal title to the office whose functions he executes. A person who serves as an officer, and claims to be one is estopped to deny his official appointment. 2 Bish. Cr. Law, §392. So it appears that a de facto as well as a de jure officer is punishable for extortion, as he is for any other malfeasance in office. But an official character, either de facto or de jure, is essential. The indictment is drawn in the usual form, and charges that the defendants were officers, and, by color of their office, extorted. This is a material averment, proof of which is absolutely required to support a conviction."[9]

Kitby v. State, 57 N.J.L. 320, 321-22, 31 A. 213, 213-14 (Sup. Ct. 1894).

9. *See, e.g.*, United States v. Nardello, 393 U.S. 286, 289 (1969); United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947); United States v. Laudani, 134 F.2d 847, 851 n.1 (3d Cir. 1943), *rev'd on other grounds*, 320 U.S. 543 (1944); Dunlap v. Curtis, 10 Mass. 210 (1813); Senate Begyn, 34 N.J. 35, 167 A.2d 161 (1961); State v. Weleck, 10 N.J. 355, 371, 91 A.2d 751, 759 (1952); Commonwealth v. Wilson, 30 Pa. Super. 26, 30 (1906); The Queen v. Baine, 87 Eng. Rep. 946.

Mazzei never pretended to hold any executive department office nor did he pretend that he could personally award the leases. He did no more than represent that he could influence those executive department officers who controlled the granting of leases. This was not common law extortion. Mazzei was not misusing the office of senator. He was misusing his personal political power to influence the conduct of another officer.

IV The Statutory Offense

There is no federal common law of crimes. Nevertheless, when Congress uses words of technical import at common law one must, in the absence of contrary indications, assume that Congress intended to incorporate at least some of the common law meaning. As the majority opinion points out, the word "extortion", as used in § 1951(b)(2), first appeared expressly in the Anti-Racketeering Act of 1946 [10] which amended the Anti-Racketeer-

10. Act of July 3, 1946, ch. 537, 60 Stat. 420. The 1946 version of § 1951 was modified by Act of June 25, 1948, ch. 645, 62 Stat. 793 to read as it does today. The 1946 version read, in pertinent part, as follows:

"Sec. 1. As used in this title—

(a) The term 'commerce' means (1) commence between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a rela-

ing Act of 1934.[11] The 1934 statute was addressed primarily to labor racketeering, and contained no express reference to extortion. It did, however, proscribe both what might be described as statutory extortion—that is, obtaining payments by use or threat of use of force—and what must have been intended as common law extortion—that is, obtaining property "under color of official right." [12] The wording

10. (Cont'd.)

tive or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

11. Act of June 18, 1934, ch. 569, 48 Stat. 979.

12. The 1934 Act read in pertinent part:

"Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

of the 1934 statute presented some difficulties in its application to labor racketeering, and receiving a fairly narrow reading in *United States v. Teamsters Local 807,* 315 U.S. 521 (1942). In specific reaction to that decision the 1946 statute was enacted.[13] Structurally it differed from the 1934 Act in several respects. Those differences important for our purposes are that the first section contains a definition of the term "extortion" and for the first time proscribed "extortion" in specific language. But the definition in § 1(c) of the 1946 Act, now § 1951(b)(2), although it broadened the description of coercive extortion somewhat,[14] merely carried forward the "under color of official right" language of § 2(b) of the 1934 Act. Thus whatever congressional intention may be ascribed to that term must be found in the records of the Seventy-third Congress.

There is no legislative history extant tending to show that the 1934 Act was intended to empower federal authorities to police influence peddling in the political processes of the states.[15] Whatever legislative history there is suggests a contrary conclusion. The 1934 Act originated in the Senate as S. 2248, 73d Cong., 2d Sess. (1934), reprinted in 78 Cong. Rec. 457-58 (1934). It was proposed by Senators Copeland, Vandenberg and Murphy and con-

12. (Cont'd.)

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or **(b); or**

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000 or both."

Act of June 18, 1934, ch. 569, § 2, 48 Stat. 979-80.

13. H.R. Rep. No. 238, 79th Cong., 2d Sess., reprinted in 1946 U.S. Code, Cong. & Admin. News 1360, 1370.

14. *Compare* § 1(c) of the 1946 Act, *supra* note 10 *with* § 2(b) of the 1934 Act, *supra* note 12.

15. See S. Rep. No. 532, 73d Cong., 2d Sess. (1934); H. Rep. No. 1833, 73d Cong., 2d Sess. (1934).

tained no reference to extortion by "color of official right." After passing the Senate, 78 Cong. Rec. 5734 (1934), it was submitted in the House, where it was completely amended and a new bill substituted. The reasons for this amendment have been described by the Supreme Court in *United States v. Teamsters Local 807, supra,* at 529, as follows:

> "After the bill had passed the Senate, however, representatives of the American Federation of Labor expressed fear that the bill in its then form might result in serious injury to labor, and the measure was redrafted by officials of the Department of Justice after conferences with the President of the Federation."

With the House revision the term "color of official right" appeared for the first time.

The House Report, submitted along with its new version of S. 2248 (H.R. 6926), was short. In addition to reprinting the text of the new bill, it reprinted a letter written by Homer Cummings, then Attorney General, to Hatton W. Sumners, Chairman of the House Judiciary Committee. H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934). In *United States v. Teamsters Local 807,* the Supreme Court placed heavy emphasis on this letter as a tool to interpret the 1934 Act. The letter, which I have reprinted in the margin,[16] is particularly useful. By negative impli-

16. "DEPARTMENT OF JUSTICE,
HON. HATTON W. SUMNERS, Washington, D.C., May 18, 1934
Chairman of the Judiciary Committee, House of Representatives,
Washington, D.C.

Dear Mr. Sumners: I am enclosing herewith the new draft of the anti-racketeering bill, S. 2248, which has been prepared upon the informal suggestion of your committee as a substitute for the bill which your committee has under consideration.

After a series of conferences with Mr. Keenan and Mr. Rice, this draft has been definitely approved by Mr. William Green, president of the American Federation of Labor, and James S. Easby-Smith, Esq., counsel for Mr. Green.

We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.

The original bill was susceptible to the objection that it might include within its prohibition the legitimate and bona fide activities

cation, the letter's failure to discuss "extortion under color of official right" suggests that the draftsmen did not intend the prohibition to reach conduct not extortionate at common law. One would expect at least a passing comment to be made by the draftsmen if they intended to attach revolutionary meaning to a term of art, long known and used.

The conclusion that the statute was not intended to revolutionize the meaning of "color of official right" is buttressed by a comment made by Congressmen Oliver of New York, who apparently submitted this bill in the House, after it had cleared committee:

> "This is *merely* the creation of an extortion statute against those who extort money by force or violence from those engaged in interstate commerce." 78 Cong. Rec. 11402 (1934) (emphasis supplied).

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16. (Cont'd.)

of employers and employees. As the purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce, it seems advisable to definitely exclude such legitimate activities.

As the typical racketeering activities affecting interstate commerce are those in connection with price fixing and economic extortion directed by professional gangsters, we have inserted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce.

The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that act an effective weapon in prosecuting racketeers. The antiracketeering bill would extend the Federal jurisdiction in those cases where racketeering acts are related to interstate commerce and are therefore of concern to the Nation as a whole.

We have added a new provision prohibiting conspiracy as well as the substantive acts and we have also added a separability clause to make certain that the entire act will not be declared unconstitutional in the event that its application to any circumstance is held invalid.

We feel that this bill is a vital part of any Federal program to suppress so-called 'racketeering' activities which have assumed Nation-wide proportions.

Sincerely yours,

HOMER CUMMINGS, Attorney General"

There is little doubt that the draftsmen of the 1934 Act took the term "color of official right" from the New York Penal Law of 1909. Section 850 of that law, which defined the crime of extortion, read as follows:

> "Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right."[17]

Compare this language with § 2(b) of the 1934 Act:

> "Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right;"

The similarity between the two definitions must be more than accidental.

While the meaning attributed to the term "color of official right" by the New York legislature and courts is by no means dispositive of the congressional intent in using the phrase, it is highly persuasive both because its meaning in New York has long been settled and because the legislative history indicates no intention to change that meaning.

The phrase "under color of official right" traces its origin to a penal code prepared by David Dudley Field and others. Commissioners of the Code, The Penal Code of the State of New York (1865). Interestingly, the definition of extortion in that code, is even closer to the one used in the 1934 Act, than is New York's 1909 version. The Field version provided:

> "§ 613. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

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17. Penal Law of 1909, § 850, *as amended*, Laws of 1917, ch. 518, *reprinted in* N.Y. Penal Law, appendix § 850 (McKinney 1967).

In a note to that definition the Commissioners referred to an old New York case, *People v. Whaley*, 6 Cow. 661 (N.Y. Sup. Ct. 1827), for the derivation of the "color of official right" language. *Whaley* involved a typical common law extortion. A suit had been commenced on a note. On the return date of the summons the plantiff did not appear. After telling the defendant that he was going to tax the plaintiff with costs, the justice secretly adjourned the case. However, the defendant confessed judgment and paid the amount he owed on the note into the court. The justice collected a fee to which he was technically entitled only if a judgment had been entered. But, the jury was permitted to find, and did, that the plaintiff's non-appearance had caused the case to be discontinued. Thus no judgment could have been entered since the discontinuance ousted the justice of jurisdiction. The fee had been collected "under color of official right." The court defined the offense thus:

> "Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due." *Id.* at 663.

The Field Code does not appear to have been adopted in its entirety. However, it served as a prototype for a new penal statute, the Penal Code of 1881. Laws of 1881, ch. 676. That enactment copied Field's definition of extortion verbatim. Section 552 of the Penal Code of 1881. But, significantly the 1881 Code expanded upon Field's enactments dealing with extortion. For § 556 of the 1881 enactment contains the marginal notation "extortion committed under color of official right," appended to a new section not found in the Field Code:

> "§ 556. A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority,

> 1. Arrests another, or detains him against his will; or
>
> 2. Seizes or levies upon another's property; or
>
> 3. Dispossesses another of any lands or tenements; or
>
> 4. Does any other act, whereby another person is injured in his person, property, or rights;
>
> Commits oppression and is guilty of misdemeanor."

Section 556 was carried forward to the Penal Code of 1909, being re-enacted verbatim as § 854.

An examination of the Penal Code of 1909 reveals something else that is noteworthy. Section 854 (formerly § 556 reprinted, *supra*) is captioned "Oppression committed under color of official right." It is clear that this title was not added by McKinney, since the caption previously read "Extortion committted under color of official right" but was amended in 1945 to substitute the word "oppression" for "extortion."

What does all this tell us? Certainly the New York statute did not contemplate a prosecution such as the one we are now reviewing. The New York statute intended to proscribe common law extortion which required an act or pretended act in an official capacity. Even if I were to accept the majority's approach, and conclude that Mazzei derived his *de facto* power solely from his position as state senator, his actions were not those of "[a] public officer, or a person pretending to be such [acting] . . . under pretense or color of official authority." Remembering that the common law term was "color of office" and not "color of official right," that the latter term had been known to American jurisprudence for some 70 years before the 1934 Act, and that the legislative history suggests no reason to interpret color of official right any differently from its historical meaning, it offends all sense of logic to think

that the draftsmen chose this term of art by accident, or that they intended it to reach the offense committed by Mazzei.

Putting this all to one side, however, I come to the most disturbing feature of this case. If "color of official right" does not mean common law extortion, what does it mean? Does it give fair warning of the conduct which it proscribes? Does it mean whatever the United States Attorney in a given district says it means? Does it cover payments to corporate officers or union officials[18] as well as to public officials? Unless we attribute to Congress the intention to use the term to describe the classic common law offense of extortion, which has a well-defined content, then I submit that the disjunctive clause in the statute is unconstitutionally vague. It simply gives no fair warning of the conduct it proscribes. It is one thing to hold, as we did in *United States v. Kenny, supra,* that Congress disjunctively prohibited both the not uncommon statutory

18. *Cf. Bianchi v. United States,* 219 F.2d 182, 193-94 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955):

> "Defendants complain that under the instructions given the jury could find defendants guilty if they obtained money under color of office as union representatives. Defendants are referring to the common law offense of extortion where, in case of public officers, color of office takes the place of force, threats, and pressure. No one contends that defendants are liable merely because they are union officials, and obtained the money. As to this contention the trial court in ruling on motion for a new trial said:
>
> > 'The only time such terms have come into this case they were injected by the defendants. They appear once in the charge and then at defendants' request and in a negative way. Defendants requested and the Court gave their request number 54. It reads:
> >
> > > 'If a Union officer accepts money or property as as a private individual and not in his official capacity there can be no finding of extortion under color of office however inconsistent with official duty may be the acceptance of such money or property.'
>
> The defendants are not in a position to object to an instruction given at their request."

type of extortion—use of threats—and the common law extortion—abuse of office. It is quite another to cut the disjunctive clause loose from the anchor of the common law and set it adrift upon a sea of prosecutorial discretion.

In recent years the government has espoused a startling broad view as to what conduct is proscribed by the Hobbs Act. In *United States v. Meyers,* 44 U.S.L.W. 2003 (E.D. Ill., June 17, 1975), for example, it urged that a non-incumbent candidate who elicited a pre-election payoff to award contracts to the payor after election fell within the statute. The district court rejected this contention; rightly so, I suggest. Yet the *Meyers* case is closer to common law extortion than is this case, for the payment was made in connection with the performance of duties of the office to which the candidate aspired. If the charge under which this case was submitted to the jury is correct *Meyers* is an *a fortiori* case. I ask, however, whether anyone reading this 1934 statute aimed primarily at labor racketeering would have anticipated that it regulated state election campaign financing. To me, at least, it does not give fair warning to that effect.

V Conclusion

The Supreme Court has recently reiterated that an "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971); *United States v. Bass,* 404 U.S. 336, 347 (1971). This rule of narrow construction is rooted in the belief that due process requires that fair warning should be given as to what conduct may be subject to the sanctions of the criminal law. *See United States v. Bass, supra,* at 348; *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95-6 (1820). Otherwise far too much discretion will be placed in the hands of executive branch enforcement officials, and it will inevitably be abused. In the present climate of mistrust of persons in public life—a mistrust that unfortunately cannot be said

to be undeserved—it is tempting to hold that since what Senator Mazzei did was reprehensible he ought to be punished by some authority, and to stretch the Hobbs Act to meet the occasion. Courts must resist that temptation in the interest of the long-range preservation of limited and even-handed government. If in the guise of regulating interstate commerce Congress wants to prohibit influence peddling for hire in state and local government it should be far more specific than in § 1951(b)(2). I would read no more into the clause "under color of official right" than the common law definition of extortion. This record does not establish common law extortion and neither the court's charge nor the majority's description of the facts define it. I would reverse the conviction.

APPENDIX B.

UNITED STATES OF AMERICA

v.

FRANK MAZZEI.

Crim. No. 74-319.

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

March 17, 1975.

Richard L. Thornburgh, U. S. Atty., Pittsburgh, Pa., for plaintiff.

H. David Rothman, Pittsburgh, Pa., for defendant.

Opinion and Order.

MARSH, *Chief Judge.*

After conviction by a jury the defendant, Frank Mazzei, filed a "Motion for Judgment of Acquittal or in the Alternative for a New Trial." In our opinion the motion and the alternative motion should be denied.[1]

The motion sets forth the following reasons in support thereof:

2. The court erred in denying the motion for judgment of acquittal.

3. The verdict was contrary to law and against the weight of the evidence.

1. The defendant filed a "Motion to Allow the Filing of Additional Reasons After a Review of the Transcript." The motion was granted. The transcript was filed January 23, 1975. The defendant did not file any formal additional reasons, but submitted his brief on February 10, 1975 and the government submitted its brief on February 19, 1975. Oral argument was held on February 28, 1975.

4. Error in refusing to declare a mistrial on the prosecutor's examination of Mr. Kelly wherein he interjected the notion that defendant might be pocketing the money received.
5. Error in allowing the witness Williams to testify to the witness Kelly's state of mind.
6. Error in ruling relative to the scope of the cross-examination of defendant in the event he testified on his own behalf which deprived defendant of the opportunity to testify in his own behalf and violated his privilege against self-incrimination.
7. Error in failing to declare a mistrial when the United States Attorney argued in his closing speech that the taxpayers of Pennsylvania could have received these leases for $20,000 less.
8. Error in refusing to charge as requested and in failing to correct its charge as requested in the particulars which appear of record.
9. Error in declining counsel's request for an individual voir dire of the prospective jurors.
10. Error in denying defense counsel's request to close last or, in the alternative, to make a brief argument in rebuttal.
11. Error in denying the motion to dismiss the indictment with prejudice made before the selection of the jury in view of the pretrial publicity which appeared on the eve of trial.

We summarize the facts in the light most favorable to the verdict winner. Glasser v. United States, 315 U. S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942); United States v. Dukow, 465 F. 2d 688 (3rd Cir. 1972).

The defendant is an elected senator for the Commonwealth of Pennsylvania having been elected in the Forty-Third Senatorial District which includes the area known as the South Side, Pittsburgh, Pennsylvania. He was first elected in a special election for a one-year term to begin in January, 1968, and was subsequently re-elected for four-year terms commencing in January, 1969, and January, 1973.

BMI, Inc. (BMI) is the parent corporation and holding company of 15 or 16 subsidiaries, most of which are engaged in interstate commerce. BMI and its subsidiaries were served by the same Board of Directors. Through a subsidiary, BMI purchased a three-story building at 700 Bingham Street in the South Side on March 1, 1967. BMI occupied only one-half of the second floor, or only about 4,000 square feet of the total 60,000 square feet contained in the building. The remainder of the building was vacant and, without tenants, there were no rentals to increase the profits of the corporation or to defray the expense of the building. Attempts by BMI to rent or sell the building had been unsuccessful.

BMI was the nerve center of the accounting end of the business of all the subsidiary corporations. Practically all of the financial matters of BMI and its subsidiaries, including interstate financing transactions, were handled from the South Side location by means of interstate telephone facilities and by use of the mails. The payroll for BMI and the subsidiaries was handled through a single payroll account maintained in the Iron and Glass Bank located in the South Side not far from the BMI building.

Occupants of the BMI quarters in the South Side were: Leo B. Kelly, Vice President and Secretary/Treasurer of BMI and its subsidiaries, and a certified public accountant; Willard Bellows, the Controller; and Joseph Logan, Assistant Treasurer. Lawrence Williams, the President of BMI, had his office at another location in the Pittsburgh area. At times, the Board of Directors of BMI and its subsidiaries held meetings in the BMI building.

Mr. Kelly was also a director of the Iron and Glass Bank. Gerald R. Creehan was Vice President and Cashier

of the bank. BMI was one of the bank's largest customers and Mr. Kelly had told Mr. Creehan of his desire to obtain tenants for the BMI building. According to Mr. Kelly's testimony, sometime prior to November 4, 1971, Mr. Creehan had heard that the defendant, Senator Mazzei, who had sponsored the State Lottery Bill, was looking for space in the South Side for the Pennsylvania Lottery Commission. When Mr. Creehan mentioned this, Mr. Kelly asked him to set up a meeting with the Senator. A luncheon meeting was arranged in late November, 1971, at which time Mr. Kelly entertained the Senator and Mr. Creehan, and told Senator Mazzei that BMI desired to lease space in its building.

A short time later the Senator visited the BMI building with a Samuel Myers and informed Mr. Kelly that the State would lease the first floor at the rate of $4.25 per square foot. Mr. Kelly did not negotiate the lease or price with anyone connected with any executive department of the State Government, although there were inspections made by employees of executive agencies. On January 8, 1972, Mr. Kelly again entertained the Senator and Mr. Creehan, this time at a dinner attended by the men's wives. In his testimony Kelly characterized the dinner as primarily a business meeting.

The defendant made it clear to Mr. Kelly that he expected a kickback. Mr. Kelly testified that the Senator told him at a January 11, 1972 meeting in Mr. Kelly's office that:

> "it was the practice on all state leases that a ten per cent of the gross amount of the rentals would be paid to a senate finance re-election committee and that these funds were used for the incumbents or the senators of both parties, and that that would have to come out of the four and a quarter." (Tr. p. 207).

Penciled calculation (GX 7) made by the Senator indicated that the net amount of the rental for five years would be

ten percent less than the gross. The Senator asked Mr. Kelly if that was satisfactory and Mr. Kelly replied in the affirmative. The Senator stated that ten percent should be paid in cash at the beginning of the lease term and inquired of Mr. Kelly if that created any problem. Mr. Kelly replied in the negative. Following the meeting, Mr. Kelly informed Mr. Bellows and Mr. Logan of the terms of the arrangement and showed them the paper on which the Senator made his calculations. Mr. Kelly also informed Mr. Williams and other stockholders about the arrangement.

A lease proposal form was mailed to the State by BMI on January 13, 1972. An unexecuted lease arrived from Harrisburg about February 23rd. The lease was executed by BMI officers and returned to Harrisburg. BMI received the final lease executed by the Commonwealth about March 23, 1972. On March 24, 1972, the Senator called at the Iron and Glass Bank for the money. At the direction of Mr. Kelly, Mr. Creehan and another bank employee delivered $8,755.00 in cash to the defendant at his office which was almost across the street from the bank. There was no evidence that this kickback was ever paid to a senate re-election committee as the Senator had represented.

In November or December, 1972, Senator Mazzei inquired of Kelly about leasing space to the Department of Labor and Industry. An employee of the Department visited the premises on December 27, 1972. Subsequently, the defendant advised Mr. Kelly that a rate of $4.90 per square foot would be paid by the State and also advised that the same arrangement would be in effect whereby ten percent would be paid to the re-election committee. At a July 18, 1973 meeting in Kelly's office the Senator began calculations on a BMI note pad to determine the total rental for the five-year term of the second lease. Mr. Kelly completed these calculations and determined that the kickback would be about $11,300.00 (GX 12).

When BMI submitted this lease proposal, however, it requested a rental rate of $4.35 per square foot because it did not wish to provide janitorial service or trash removal. Mr. Kelly testified that Senator Mazzei later called him to say that "the Commonwealth or the Department, whoever takes care of leasing" (Tr. p. 262) would not accept the premises without these services and that the rate should be $4.90 and the proposal should include janitorial and trash removal services. During the telephone conversation with the Senator, Mr. Kelly agreed to these changes. No amended proposal form was ever submitted by BMI, but when the lease was received from the State it provided for a rate of $4.90 per square foot.

On Friday, July 20, 1973, Mr. Kelly was told by Senator Mazzei that the second lease had been executed by the State and that the Senator needed the money to take with him to Harrisburg on Monday. Mr. Kelly, accompanied by Mr. Williams, President of BMI, obtained $11,299.56 in cash from the bank and walked to the defendant's office where Mr. Kelly personally handed the money to the defendant's secretary. Later that same day, in a telephone conversation with Mr. Kelly, the Senator acknowledged receipt of the money. There was no evidence that this kickback was paid to a senate re-election committee. Defendant and his wife were entertained in Florida in early 1974 by an employee of BMI because a third lease with the State was pending.

The defendant indicated a consciousness of wrongdoing when he subsequently, according to Mr. Kelly's testimony, told Mr. Kelly not to reveal the payments to anyone. Later when the Senator visited Mr. Kelly's office and learned that Mr. Kelly had told his attorney everything about the leases and the payments, the Senator told Mr. Kelly that the FBI would wonder why he was in Kelly's office and asked Mr. Kelly to buy a ticket for a dinner for another senator. On cross-examination, Mr. Kelly stated that he felt the defendant, being an elected official, could handle the leases and obtain them for BMI.

Cash given to the defendant in the total sum of $20,054.56 was withdrawn on the payroll accounts of BMI and certain of its subsidiaries. There was no evidence that either BMI or the defendant treated the payments as real estate commissions. The kickbacks were not deducted as expenses in the corporate tax returns of BMI.

The prosecution contended that the ten percent rental payments were extorted from BMI by the defendant "under color of official right." The defendant contended the payments were political contributions, albeit illegal contributions from a corporation, obtained by the Senator in his unofficial role as a politician and not in his official capacity as a state senator. There was no evidence showing what the defendant did with the money after he received it. The actual existence of a bi-partisan senate committee for re-election of incumbent senators was not established in the evidence. No member of such a committee was called to prove its existence or the receipt of any part of the $20,054.56. The jury rejected the defendant's contentions that these payments were political contributions and found that this money was extorted by the defendant "under color of official right."

The defendant's 10 reasons in support of his motion for new trial, previously listed above, will now be dealt with in order.

REASONS 2-3

In our opinion the verdict of guilty was in accord with the weight of the evidence, was not contrary to law, and the motions for judgment of acquittal were properly denied.

Arguing in support of his motion for judgment of acquittal, defendant apparently contends that to pass constitutional muster the Hobbs Act, 18 U. S. C. § 1951, must require notice that extortionate conduct will interfere with interstate commerce, and that, absent such notice, the statutory definition of extortion is constitutionally vague. We do not agree.

The purpose of the Hobbs Act is to free interstate commerce from the destructive burdens of extortion. Stirone v. United States, 361 U. S. 212, 215, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); United States v. Green, 350 U. S. 415, 420, 76 S. Ct. 522, 100 L. Ed. 494 (1956). The Act expressly proscribes extortion which affects commerce "in any way or degree" and clearly represents an attempt by Congress to exercise its full power under the commerce clause to reach extortionate conduct. Assuredly, the Act requires proof of an effect on commerce as a substantive element of any violation, but this is merely a jurisdictional element underlying the power of Congress to reach the conduct. An essential part of a Hobbs Act violation is extortion, and the fact that interstate commerce is interfered with is merely the basis for federal jurisdiction. It is wholly irrelevant to the protection of commerce that the perpetrator of an extortionate scheme *know* that interstate commerce is involved, and such a requirement would defeat the Congressional purpose of freeing commerce from all extortion. Contrary to defendant's contention throughout his brief, the jury did not have to find that he could reasonably foresee or anticipate an interference with commerce before he could be convicted of violating the Hobbs Act. See United States v. Iannelli, 477 F. 2d 999, 1002 (3rd Cir. 1973), cert. granted, 417 U. S. 907, 94 S. Ct. 2602, 41 L. Ed. 2d 211 (1974); United States v. Roselli, 432 F. 2d 879, 891 (9th Cir. 1970), cert. denied, 401 U. S. 924, 91 S. Ct. 883, 27 L. Ed. 2d 828 (1971) and United States v. Blassingame, 427 F. 2d 329 (2nd Cir. 1970), cert. denied, 402 U. S. 945, 91 S. Ct. 1629, 29 L. Ed. 2d 114 (1971). *Cf.* United States v. Bolin, 423 F. 2d 834, 836-837 (9th Cir.), cert. denied, 398 U. S. 954, 90 S. Ct. 1882, 26 L. Ed. 2d 297 (1970).

Likewise, defendant's argument that *knowledge* of interference with commerce is in some manner a constitutional predicate to criminal responsibility has no basis in law. The scope of congressional police power under the commerce clause was considered by the Supreme Court in

Perez v. United States, 402 U. S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971), and it is clear that the power to protect interstate commerce is not premised on, or limited by, a requirement of specific intent to interfere with commerce.[2] The decisions under the Hobbs Act clearly reflect this. United States v. Addonizio, 451 F. 2d 49, 76-77 (3rd Cir. 1972); United States v. Pranno, 385 F. 2d 387, 389-390 (7th Cir. 1967).[3]

The requisite impact on commerce can be *de minimus*, United States v. DeMet, 486 F. 2d 816, 822 (7th Cir. 1973). The jury was justified in finding interference with commerce based upon depletion of BMI's cash assets in an amount in excess of $20,000. United States v. Addonizio, *supra*, 451 F. 2d at 77; United States v. Provenzano, 334 F. 2d 678, 692-693 (3rd Cir. 1964).

Insofar as the defendant contends that the phrase "under color of official right" as used in § 1951(b)(2) is void for vagueness, it is our opinion that this language is all that is constitutionally required in that it would give a person of ordinary intelligence fair notice of what is proscribed by the statute. Grayned v. City of Rockford, 408 U. S. 104, 108-114, 92 S. C. 2294, 33 L. Ed. 2d 222 (1972).

The defendant's argument that the case should not have been submitted to the jury because the defendant did not have "official capacity" to channel the leases to BMI cannot

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2. In *Perez, supra,* the court held that Congress could regulate purely intrastate extortionate credit transactions if it found that, considered as a class, such activities had an ultimate effect on commerce.

3. In response to a similar contention the court in *Pranno, supra,* 385 F. 2d at 389-390, stated:

> "Defendants seem to contend that it must be proved that defendants contemplated and intended that interstate commerce would be affected.
>
> All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce." (Footnote omitted).

be sustained. The evidence was overwhelming that the defendant senator represented to Mr. Kelley that he had "de facto" power to procure state leases. Mr. Kelly believed this and, without negotiating with any other person, paid $20,054.56 to the Senator for procuring those leases for BMI. The Senator's representations and actions caused Kelly to reasonably believe that the defendant, as a state senator, had the capacity and the power to procure the leases; the evidence strongly indicates he did have the power, within rate limitations, to procure leases for BMI because of his official position. He did not ask for a real estate commission; he did not ask for a political contribution. He wrongfully represented that it was the practice that state lessors should pay him, a state senator, ten percent of the gross rental for a senate re-election committee, although there was no independent proof of the existence of such a committee. As in United States v. Price, 507 F. 2d 1349, 1350 (4th Cir. 1974), we reject the defendant's contention "that guilt may be predicated only upon a further finding that he perverted the *legal* or *statutory power* (*de jure*) of his legal public office. It is enough that he appeared to act under . . . 'color of official right.'" See also: United States v. Braasch, 505 F. 2d 139, 151 (7th Cir. 1974); United States v. Staszcuk, 502 F. 2d 875, 878 (7th Cir. 1974). Senator Mazzei, a public official, wrongfully took money not due him or his office.

Even under the common law definition of extortion, it was not necessary to show that the public officer received the extorted money for the performance or non-performance of an act specifically within the scope of his official duties. See: Commonwealth v. Wilson, 30 Pa. Super. 26 (1906).[4]

4. In *Wilson, supra,* at 30, Judge Rice explained common law extortion as follows:

> "The form of extortion most commonly dealt with in the decisions is the corrupt taking by a pesron in office of a fee for services which should be rendered gratuitously; . . . but this is not a complete definition of the offense, by which I mean that it does not include every form of common-law extortion. . . . Blackstone defines it to be 'An abuse of public justice which consists in an officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due:' 4 Bl. Com. 141. This definition without substantial change of phraseology has been adopted in the Pennsylvania decisions. An essential element of the offense is that the fee or reward must be taken by the officer by color of his office, *but this does not necessarily imply that it must be taken for an act or service which it is his duty, or he has discretionary power, to perform.* It does imply, however, an exercise of official power possessed, *or pretended to be possessed,* by the officer, as distinguished from an act which could have been performed by any other person." (Emphasis supplied)

See also: Commonwealth v. Neff, 195 Pa. Super. 420, 428, 171 A. 2d 561, 565 (1961).

Defendant argues that the government did not prove that the defendant took the oath of office and, therefore, did not prove he was in fact a senator. On the contrary, we find that the weight of the evidence introduced by the government clearly establishes that the defendant Mazzei was a state senator. Official election returns introduced into evidence show that Mazzei was first elected in a special election held in November, 1967 and that he was subsequently re-elected to full four-year terms in November, 1968 and November, 1972. In fact, in the 1972 election Mazzei was the candidate for both parties receiving 56,685 votes as a Democrat and 29,264 write-in votes as a Republican.[5]

5. While discussing another matter on cross-examination, Mr. Kelly testified that he had gone to Harrisburg for the Senator's swearing-in, but that Kelly arrived late and missed the actual oath of office. Testimony by Mr. Creehan and Mr. Kelly indicated that they had knowledge that the defendant had sponsored the bill establishing the Lottery Commission in Pennsylvania. Even if the evidence presented was insufficient to prove the defendant is a state senator, the evidence did provide a sufficient basis from which the court could take judicial notice of the fact that defendant took the oath of office after being elected to the Senate, and that at all times pertinent to this case he was a member of the Pennsylvania Senate.

For the foregoing reasons we think it would be error to grant the defendant's motion for judgment of acquittal.

REASON 4

It is our opinion that a mistrial was not warranted when the prosecutor interjected the notion that Senator Mazzei might have pocketed the money.

What the defendant did with the $20,054.56 was relevant to show his motive and intent. We think it quite relevant to inquire of Kelly what he knew of defendant's intention concerning the disposition of the money. In view of the failure of the defendant to prove he delivered the money to the senate finance committee, as he represented to Kelly, the prosecutor's suggestion, or "notion," even if improper at the time was not of such prejudicial magnitude requiring a mistrial.

Moreover, the jury was subsequently instructed (Tr. p. 944) as defendant requested that "the use to which defendant put the money paid to him was not an issue in this case."

REASON 5

Defendant argues that the testimony of Lawrence Williams about a telephone conversation with Leo Kelly was prejudicial in that it allowed the government to establish through Williams an element of fear in the victim Kelly which had not been established through Kelly's own testimony. In an extrotion case where elements of fear or color of official right are involved, proof of the state of mind of the victim is relevant. This proof may come through the victim's own testimony or through testimony of statements made by him to others. United States v. Kennedy, 291 F. 2d 457, 458 (2nd Cir. 1961). Of course, to be admissible, such testimony must not run afoul of the hearsay rule. In this instance, however, it does not matter whether or not the evidence is hearsay. Nuttall v. Reading Company, 235 F. 2d 546, 551 (3rd Cir. 1956). McCormick, Evidence § 249 (2nd ed. 1972). One of the exceptions to the rule excluding hearsay allows a witness to testify to a statement of the declarant's then existing state of mind. Even if it is accepted that Williams' testimony about Kelly's statement was submitted to establish the truth of the matter asserted, the testimony was properly received under this exception.

Defendant's argument that the testimony was prejudicial is without merit for two reasons. First, the relevance of the testimony in showing Kelly's state of mind far outweighed any prejudicial effect; and second, the issue of fear on the part of Kelly never reached the jury because, at the close of the government's case, the defendant's motion for a judgment of acquittal was granted as to that portion of the indictment which charged that money had been exorted "by the wrongful use of fear."

REASON 6

The defendant asserts the court erred in its ruling (Tr. pp. 703-708, 838-842) relative to the scope of cross-examination of defendant in the event he testified, which ruling "deprived defendant of the opportunity to testify on his own behalf."[6] Counsel for defendant specifically stated he would limit "direct testimony of the defendant to the purpose for which the money was paid and the purpose for which he solicited it." (Tr. p. 838) The defendant contended that in light of this offer he could not be cross-examined relative to the use of the money he received from BMI. We disagree.

It is well settled that when a defendant takes the stand on his own behalf he is subject to full cross-examination just as any other witness. United States v. Benson, 487 F. 2d 978, 982 (3rd Cir. 1973); United States v. Lowe, 234 F. 2d 919, 922 (3rd Cir. 1956). Regardless of whether we adopt the view which limits cross-examination to the sub-

6. See paragraph 6 of the defendant's motion for judgment of acquittal or in the alternative for a new trial .

ject matter of direct examination,[7] or the view which allows a witness to be cross-examined on any matters relevant to the case,[8] the testimony which apparently would have been elicited from defendant in light of his offer would have allowed the prosecution to proffer questions as to the ultimate use of the money. While it is true that the ultimate use of the money would not be a defense to the extortion charge, how the defendant disposed of the money would be relevant to the defendant's intent in soliciting and receiving the payments, the very matters which were to be the subject of defendant's "limited" direct examination. Such questioning would also be relevant as to the credibility of Mr. Kelly, who had testified that defendant told him it was the practice on all state leases that ten percent of the gross rental was payable to a senate re-election committee.

We also disagree with defendant's contention that this refusal to limit cross-examination if defendant had taken the stand was in effect a denial of defendant's Fifth Amendment right against self-incrimination. Defendant's voluntary testimony on the matters described in his counsel's offer to the court would have been a waiver of his privilege as to all other relevant facts. Johnson v. United States, 318 U. S. 189, 195, 63 S. Ct. 549, 87 L. Ed. 704 (1943); United States v. Weber, 437 F. 2d 327, 334 (3rd Cir. 1970); 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2276(2). To allow the defendant to testify as to his purpose in soliciting and receiving the payments, which defendant contended were simply political contributions, without allowing the prosecutor to probe this statement of purpose with relevant questions as to the ultimate disposition of the money would have distorted the factual picture before the jury.

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7. Federal Rules of Evidence, Rule 611(b) as approved January 2, 1975 (effective July 1, 1975).

8. United States v. Green, 373 F. Supp. 149, 154 (E. D. Pa. 1974); *Cf.* United States v. Hykel, 461 F. 2d 721, 728 (3rd Cir. 1972).

Considering all of the above, we find no error in our refusal to limit the scope of cross-examination of the defendant.

REASON 7

The defendant contends a mistrial should have been granted when the prosecutor argued that the taxpayers of Pennsylvania could have received the BMI leases for $20,000 less. We find no merit in the contention of the defendant.

As to this contention the testimony of the defendant's witness, Coll, a field representative for the Bureau of Real Estate, Department of Property and Supplies, on cross-examination, responded in the affirmative to the question whether he would have been more satisfied if he could have obtained the leases from BMI for $20,000 less. (Tr. p. 790) He also testified he sought to get the lowest rental conforming to the standards and requirements of his agency. (Tr. p. 789) Therefore, the argument of the prosecution had an evidential basis. In any event, the remark was not of such prejudicial magnitude which would require a mistrial.

REASON 8

The defendant asserts the court erred in refusing to charge as requested and in failing to correct its charge as requested.

Specifically, the defendant excepted "to the failure to charge on the common law definition of extortion as opposed to the definition that the court has given." (Tr. p. 957)

He contends that under the common law definition of color of official right the jury should have been charged that the money received must have been claimed or accepted under right of office and the person paying must have yielded to official authority.

We do not find that there is as great a distinction as defendant contends between the common law and the law under the Hobbs Act in this regard.[9] However, the applicable law in this case was the Hobbs Act and our instructions fully covered the meaning of "extortion" as used in the Hobbs Act and conformed to the principles set forth by Mr. Justice Clark in *Braasch, supra,* 505 F. 2d at 150-151. (Tr. pp. 942-943)

The defendant seems to except to the fact that the charge should have informed the jury to distinguish between "motivation for payment focused on the defendant's position" and "his ability to exert political influence." But the jury was told in emphatic terms that:

> "If you [the jury] find from the evidence that BMI's treasurer, Mr. Kelly voluntarily made political contributions out of the funds of BMI, Inc. to the defendant for the re-election of incumbent state senators of both political parties and not as kickbacks demanded by the defendant for procuring state leases, you should find the defendant not guilty.
>
> Political contributions made by a corporation may be illegal, but if these illegal contributions were freely and voluntarily made by the officers of BMI to the defendant, and not wilfully extorted by the defendant as kickbacks under color of official right, he is not guilty of extortion." (Tr. pp. 944-945)

The defendant also takes exception to the failure to charge on the offense of bribery. Since the defendant was not charged with bribery, such an instruction may have been confusing and certainly was unnecessary.

9. In applying the common law definition of extortion, the Pennsylvania Superior Court upheld the conviction of a police official who had no lawful authority to grant the privilege sought by the victim of the extortion and who never actually declared that he had such authority, but whose conduct was tantamount to an assertion and use of his official authority as a cover for his act of obtaining a payment to which he was not entitled. Commonwealth v. Wilson, 30 Pa. Super. 26, 31 (1906). See the common law definition of extortion set out in footnote 4, *supra.*

The defendant excepted "to the failure to charge that as to interstate commerce,—the government does have to prove that the defendant knowingly and directly involved himself in some way with the business of the corporation or the entity that he affected in commerce." Without repeating the instructions relating to interstate commerce (Tr. pp. 937-941 and Tr. pp. 943-944), in our opinion the jury was adequately instructed on the issues of interstate commerce.

As to the defendant's final general exception, we reiterate that there was no issue concerning a distinction between official duties and political functions. So long as the motivation for the payments focused on the Senator's office, the Hobbs Act is applicable. *Braasch, supra,* 505 F. 2d at 151. The issue here was whether the defendant extorted money from BMI under color of official right.

REASON 9

Individual questioning of every juror was not required in this case. Instead, the court addressed general questions to the entire array and followed-up by questioning individually those whose responses to any of the initial inquiries on pretrail publicity raised the possibility that they might have formed an opinion on the case. (Tr. pp. 61-70) This method was in accord with recommended procedures outlined in the American Bar Association's Standards Relating to Fair Trial and Free Press §3.4(a) approved by the Third Circuit in United States v. Addonizio, 451 F. 2d 49, 67 (3rd Cir. 1972) for use by the district court's in this circuit. This same procedure was upheld in United States v. Liddy, 509 F. 2d 428 (D. C. Cir. 1974).

Furthermore, when a publicity question arose during the trial, each juror was questioned individually under oath as to whether or not he or she had read or heard any such publicity. (Tr. pp. 748-757)

REASON 10

The traditional practice in this district in both state and federal courts is to have the prosecution, the party with the burden of proof in a criminal case, argue last to the jury. There was no error in following that practice in this case. The order of argument is a matter within the discretion of the trial court. United States v. El Rancho Adolphus Products, 140 F. Supp. 645, 649-650 (M. D. Pa. 1956), aff'd, 243 F. 2d 367 (3rd Cir. 1957).

REASON 11

The court found the pretrial publicity to be neither extensive nor prejudicial. We still do not find it to be prejudicial and in our opinion there was no error in that regard.

CONCLUSION

Additional errors were set forth in defendant's brief which were not raised in his formal motion for new trial. Practically every ruling adverse to the defendant was fully argued pro and con at the trial; the reasons for the rulings appear in the record and need no further discussion here. As to the additional allegations of error, we do not find them, either individually or cumulatively, to present sufficient grounds for a new trial.

An appropriate order will be entered.